For the plaintiffs it was argued that the tenancy was one of the "other assets of the business of Nahar & Co." under clause 6, that the partners were under clause 5 "entitled to the capital and property for the time being of the partnership ... in equal shares" and that the joint effect of the two clauses was to divest the tenant of his tenancy and to vest it in the partners, thus constituting an assignment. This submission was rejected by the Privy Council.

Their Lordships held that the fact that these excellent premises were an asset to the business does not bear on the question whether the tenancy was an asset of the business which was transferred to the partnership, and that the fact that the partners enjoyed the use of the entire premises was an obvious consequence of the partnership deed but does not decide the point at issue.

Lord Pearce, giving the advice of the Board, said at page 13 —

"When one person is proprietor of a business the question which assets are included as assets of the business may not always be clear. There is no certainty that the tenant regarded his personal tenancy, albeit used by him as premises for carrying on the business, as an asset of the business, which passed with the business. And if, under the deed, the tenancy was being assigned to the partnership, one would certainly expect to find clearer provision with regard to it. The tenancy might have been dealt with by the tenant giving to his partners a licence to trade with him there or by his constituting himself a trustee for the partnership, or merely by giving the partners no express rights at all. From a practical point of view the incoming partners were, even if no arrangement at all was made about the premises, adequately protected by clause 4 which provided that the business should be carried on at the premises 'or at such other place or places as the partners may from time to time agree upon'."

I agree with the learned trial judge that like the partnership deed in *Gian Singh*,[4] the partnership agreement in this case contains no specific reference to the tenancy but merely states that the business shall be carried on at the said premises unless and until otherwise determined by the partners and it cannot therefore be inferred that the plaintiff has assigned his tenancy to the partnership. If under the deed the tenancy was being assigned to the partnership one would certainly expect to find clearer provision with regard to it. The fact that the partnership enjoyed the use of the premises and had exclusive possession are only consequences of the partnership agreement. All receipts for rent issued by the landlords were issued in the name of the plaintiff. That the defendant understood the implication of this is shown by the fact that he tried to amend some receipts to make them appear as if they were in favour of "Noorjihan Restaurant". The fact that rents, electricity and water charges were paid out of the partnership fund was not unexpected, because these charges were incurred for the benefit of the business. As in *Gian Singh*,[4] here too the tenancy agreement contained a provision against assignment; and there was no approach made to the landlords by the partners for an assignment of the tenancy to the partnership. Indeed the landlords were ignorant of the partnership arrangement between the two parties. It is true that the plaintiff himself had not come back to Pasir Mas, but that does not mean that he has abandoned the tenancy or assigned it. The fact that the plaintiff has accepted his half share of the business on dissolution of the partnership, does not imply that he has assigned the tenancy.

For the reasons given by the learned trial judge I agree that the decision in *Asmabai*[1] is peculiar to the facts of that case and is not applicable to the instant case.

I would therefore dismiss this appeal with costs. The appellant's deposit to respondent against his taxed costs.

Ali and **Wan Suleiman F.JJ.** concurred.

Appeal dismissed.

Solicitors: *Wilson & Co.; Wrigglesworth & Co.*

JACOB v. OVERSEA-CHINESE BANKING CORPORATION, IPOH

[F.C. (Suffian L.P., Lee Hun Hoe C.J. (Borneo) and Raja Azlan Shah F.J.) August 24, 1974]

[Ipoh — Federal Court Civil Appeal No. 69 of 1974]

Land Law — Charge of land to bank to secure payment of overdraft — Default in payment of principal and interest — Notice given in form 16D — Whether effective — National Land Code, ss. 253, 254 and 255.

In this case the appellant had charged his land to the respondent bank to secure the repayment of an overdraft. The charge was to cover an overdraft of $6,000/- and for interest. On default of payment the respondent bank made a demand for payment by letter and subsequently served on the appellant a notice of default in the form of 16D prescribed by the National Land Code. The bank applied for an order that the land be sold by public auction and the application was allowed in the High Court. The appellant appealed and one of the grounds of appeal was that the notice should have been given in the form 16E.

Held: (1) the object of the legislature was to see that sufficient notice was given to the chargor before the chargee applied for an order of sale and in this case the chargee had given the chargor sufficient notice before coming to the court;

(2) where there was a demand for payment of principal and interest, Form 16E could be used as well as Form 16D and the demand may be made by either form;

(3) the charge in this case was up to the limit of $6,000/- for principal and the appellant was therefore entitled to get judgment only for the repayment of this sum as principal. As the respondent bank had not particularised what part of their claim for $7,393.11 was for principal and what part for interest they should only get judgment for $6,000/-.

FEDERAL COURT.

J. R. Devadas for the appellant.

Bala Mahesan for the respondent.

Suffian L.P.: On 16th August, 1966, the appellant (whom I shall refer to simply as the chargor) executed a charge in favour of the respondent bank (whom I shall refer to simply as the chargee) over his land to secure the repayment of an overdraft.

The relevant words of the charge read:

"I (chargor) proprietor of the land described below (hereinafter called the said land): for the purpose of securing the payment to the chargee ...., with interest, the sums from time to time due to the said chargee by me .... up to the limit hereinafter stipulated:

Hereby charge the said land with the payment to the chargee .... of the said sums and interest thereon in accordance with the provisions annexed hereto.

....

Annexure

I (chargor) DO HEREBY EXPRESSLY AGREE ...

1. On demand to pay to the chargee and do hereby confirm that the said land is charged with and shall be security for the payment on demand of all sums heretofore or hereafter to be advanced to me by the chargee .... with interest thereon at the rate hereinafter stipulated .... up to the abovementioned limit of .... $6,000 only for principal (hereinafter called the said limit) and for interest at the rate of ... 9.6% per annum with monthly rests .... such sums to be raised and paid at the times and in manner following that is to say forthwith upon demand by the chargee in manner provided.

2. Any notice or demand required or authorised by this charge or statute to be given or served may be made by a notice in writing in such form as may be prescribed by the National Land Code ...

13. It is hereby agreed that for the purpose of ascertaining whether the limit of the principal intended to be hereby secured has been exceeded or not all accumulated and capitalised interest shall be deemed to be interest and not principal sum."

On 27th March, 1968, the chargee wrote the chargor a letter as follows: —

"We wish to draw your attention to your excess overdrawings of $6,279.50 against an authorised limit of $6,000.00.

Please arrange to pay in about $350.00 as soon as possible."

On 11th June, 1971, the chargee wrote him another letter: —

"This is to inform you that you have exceeded your Current Account Overdraft limit of $6,000/- by $281.03 (Dollars Two hundred eighty one and cents three only), at the close of business on 31st May, 1971.

In view of our fast approaching closing, we shall be glad if you will kindly cover up the excess as soon as possible."

On 2nd December, 1971, the chargee wrote him yet a third letter: —

"Your Overdraft Account No: 2388

We wish to draw your attention to your excess overdrawings of $465.73 as at 29th November, 1971 due to accumulation of interest against an authorised limit of $6,000/-.

We hereby request you to settle the excess on or before 9th December, 1971, failing which, we shall have no alternative but to recover the overdrafting from you."

On 5th April, 1972, the chargee served on him a notice of default in form 16D prescribed by the National Land Code. That notice was as follows:

"NATIONAL LAND CODE
FORM 16D
(Section 254)

NOTICE OF DEFAULT WITH RESPECT TO A CHARGE
To: Jacob s/o Muthiah of 2 Jalan Cherry Park, Ipoh, chargor under the charge described in the schedule below of the land so described.

Whereas you have committed a breach of the provisions of this charge by failing to pay to the chargee the balance of the principal sum secured by the charge and amounting to $6,655.55 inclusive of interest as on the 25th day of February 1972 payable on demand with further interest at the rate of 10½% per annum from the 26th day of February 1972 to the date of repayment.

And whereas the breach has continued for a period of at least one month prior to the date of this notice.

We as solicitors for the Oversea-Chinese Banking Corporation Limited the chargee by virtue of the powers conferred by section 254 of the National Land Code hereby require you within the period of one month from the service of the notice to remedy the breach.

And Take Notice that if you fail to remedy the breach within that period the chargee shall apply for an order of sale.

Dated this 5th day of April, 1972."

The schedule to the notice described the land charged.

The bank applied for an order that the land be sold by public auction for the recovery of the amount due.

On 19th April, 1974, the late Sharma J. allowed the application and the chargee has appealed to this court.

Unfortunately Sharma J. died before he had time to write his grounds of judgment, and so we have to decide this appeal without the advantage of knowing the reasons for his decision.

The first ground of appeal is this. The remedies made available to chargees under chapter 3 of the National Land Code are available only "in the event of a breach by the chargor of any of the agreement on his part", see section 253(1) of the Code. It is argued that here there has been no breach by the chargor because —

(i) under clause 1 of the charge, the money secured was payable only "upon demand by the chargee in manner hereinafter provided";

(ii) clause 2 of the charge provides the manner by saying that "any notice or demand required to be given or served may be made by a notice in writing in such form as may be prescribed by the National Land Code";

(iii) the form prescribed by the Code was form 16E;

(iv) whereas the chargee used form 16D.

Before considering this argument it is desirable to set out the language of the relevant sections of the Code.

"253. (1) The provisions of this Chapter shall have effect for the purpose of enabling any chargee to obtain the sale of the land to which his charge relates in the event of a breach by the chargor of any of the agreements on his part expressed or implied therein.

(2) .....

254. (1) Where, in the case of any charge, any such breach of agreement as is mentioned in subsection (1) of section 253 has been continued for a period of at least one month or such alternative period as may be specified in the charge, the chargee may serve on the chargor a notice in Form 16D —

(a) specifying the breach in question;

(b) requiring it to be remedied within one month of the date on which the notice is served, or such alternative period as may be specified in the charge; and

(c) warning the chargor that, if the notice is not complied with, he will take proceedings to obtain an order for sale.

(2) .....

(3) If at the expiry of the period specified in any such notice the breach in question has not been remedied —

(a) the whole sum secured by the charge shall (if it has not already done so) become due and payable to the chargee; and

(b) the chargee may apply for an order for sale in accordance with the following provisions of this Chapter;

Provided that paragraph (a) shall not apply to any charge to secure the payment of an annuity or other periodic sum.

255. (1) Where the principal sum secured by any charge is payable by the chargor on demand, the chargee may make the demand by a notice in Form 16E, and in that event, if the sum in question is not paid to him within one month of the date on which the notice is served, may apply forthwith for an order for sale without being required to serve a notice in Form 16D under sub-section (1) of section 254.

(2) ....."

Forms 16D and 16E are as follows: —

"National Land Code
Form 16D
(Section 254)

NOTICE OF DEFAULT WITH RESPECT TO A CHARGE

To .....

of .....

chargor under the charge described in the schedule below of the *land/lease/sub-lease so described.

Whereas you have committed a breach of the provisions of this charge by —

.....

.....

.....

And whereas the breach has continued for a period of at least *one month/†..... prior to the date of this notice;

I, as chargee, by virtue of the powers conferred by section 254 of the National Land Code, hereby require you within the period of *one month/†..... from the service of this notice to remedy the breach;

And take notice that if you fail to remedy the breach within that period, I shall apply for an order of sale.

Dated this ..... day of ..... 19.....

.....
Signature (or other form of execution)
by or on behalf of chargee

* Delete as appropriate.

† Here insert period specified in charge (if different).

SCHEDULE OF LAND *AND INTEREST
[as in Form 13A]

National Land Code
Form 16E
(Section 255)

DEMAND FOR PAYMENT OF A PRINCIPAL SUM

To .....

of .....

chargor under the charge described in the schedule below of the *land/lease/sub-lease so described.

Whereas the principal sum secured by the charge amounts to $..... and is payable on demand;

I, as chargee, by virtue of the powers conferred by section 255 of the National Land Code, hereby require payment of that sum forthwith;

And take notice that, if the said sum is not paid within one month of the service of this notice, I shall apply for an order of sale.

Dated this ..... day of ..... 19.....

.....
Signature (or other form of execution)
by or on behalf of chargee

SCHEDULE OF LAND *AND INTEREST
[as in Form 13A]

* Delete as appropriate.

† Here insert period specified in charge (if different)."

In my judgment there is no merit in the first ground of appeal.

The principal sum secured by this charge was payable by the chargor on demand within the meaning of subsection (1) of section 255, therefore the chargee "may make the demand by a notice in Form 16E, and in that event, if the sum in question is not paid to it within one month of the date on which the notice is served, may apply forthwith for an order of sale without being required to serve a notice in Form 16D under subsection (1) of section 254." The chargee did not make the demand by a notice in Form 16E. I do not however think that this invalidated the demand made here. The demand here was first made by the letter of 2nd December, 1971, of which the second paragraph clearly said that if the excess over the overdraft was not settled on or before 9th December, 1971, the chargee will have "no alternative but to recover the *overdraft* from you." From the context, the word in italic must in my judgment mean the entire overdraft. Subsection (1) of section 255 does not say that the chargee *shall* make the demand by a notice in Form 16E, so that it is open to it to make the demand in any other way, though I agree with counsel that the chargee cannot, for instance, do so by simply telephoning the chargor. If the chargee here had simply made its demand by the letter of 2nd December, 1971, the demand might in my view have been defective, but here it followed it up by serving on the chargor a notice in Form 16D, which clearly set out its complaint and fairly warned the chargor that, if he failed to pay the money due, the chargee would apply for an order of sale. The language of subsection (1) of section 255 would seem to indicate that if the chargee had made its demand by using Form 16E it need not have followed it up by also serving notice by Form 16D, but that if it did not first use Form 16E it would be all right if it used only Form 16D. The object of the legislation is to see that sufficient notice is given to the chargor before the chargee applies for an order of sale, and in my judgment here the chargee has given the chargor sufficient notice before coming to court.

During the course of the argument counsel for the chargee said that Form 16D was used because this was a demand for principal and interest, and that Form 16E was appropriate where there was a demand for principal only, probably because it is headed "Demand for payment of a *principal* sum". With respect I do not think it correct to say that if you demand principal and interest you use Form 16D, but if you demand principal only, you must use Form 16E. In my view, as neither section 254 nor section 255 uses the word "interest", interest may be claimed by either form.

It seems to me that much of the argument as to whether Form 16D or Form 16E should be used would have been avoided if it is remembered that section 62 of the Interpretation Act No. 23 of 1967 provides:

"Any written law prescribing a form shall be deemed to provide that an instrument or other document purporting to be in that form shall not be invalidated by reason of any deviation from the form if the deviation has no substantial effect and is not intended to mislead."

The second ground of appeal relates to the amount due under the charge. It is argued on behalf of the

chargor that the charge was not available to recover the whole of the sum of $7,393.11 claimed by the chargee as due on 25th February, 1973, and further interest, because the limit secured by the charge ($6,000) was for both principal and interest, as is clear from the language of the charge and of the three letters written by the chargee to the chargor. On behalf of the chargee it is argued that the limit covered only principal, but not interest, so that the charge would secure payment of capital up to $6,000 and payment of interest even in excess of that sum.

In my judgment the limit covers only principal, and not both principal and interest. This is because the relevant words of the charge are —

"up to the .... limit of ... $6,000 only for principal (hereinafter called the 'said limit') and for interest."

During the course of the arguments I said that I was inclined to believe that the limit covered both principal and interest. I then overlooked the words in brackets and their positioning. They appear immediately after the word "principal"; this clearly means that the word "limit" was intended to refer solely to principal. If they had appeared after the word "interest" or if they did not exist at all, then clearly the limit would have covered both principal and interest. I am therefore of the opinion that there is no merit in the second argument that the limit covered both principal and interest.

However for what amount should the chargee/bank win judgment? In fact it claimed and won judgment for $7,393.11, being the sum due on 25th February, 1973. The court does not know how much of this was principal and how much interest. The chargor had written to ask the chargee this question, but the chargee refused to tell. It has not told the court. In this case, we are of the opinion that as the burden is on the chargee to satisfy the court that its claim comes within the terms of the charge and as it has not done so, it should win judgment only for the sum of $6,000. and we would accordingly adjust the amount allowed by the learned judge in his order.

The third ground of appeal relates to the size of the land. The charge gives the size of the land as 13.58 poles, but the chargee's application and the order of sale obtained by it gives it as 6.89 poles. Section 214 of the Code forbids the transfer of *part* of land and it is said that therefore the order of sale is void. Clearly there have been clerical errors, and if it was too late for the High Court to correct the errors, it is not too late for us to do so, and we would therefore order that the learned judge's order be amended accordingly.

In the result, subject to the above two amendments the learned judge's order is affirmed. Accordingly, this appeal is dismissed with costs. Appellant's deposit to respondent against taxed costs.

I am authorised by Raja Azlan Shah F.J. to say that he concurs with this judgment.

Lee Hun Hoe C.J. (Borneo): I have the advantage of reading the judgment of the Lord President with which I agree. I have only a few words to add.

It seems that controversy always arises as to whether Form 16E or 16D should be used in this type of cases. I do not agree that if one is demanding principal and interest one would have to use Form 16D but if principal only is demanded then Form 16E must be used. Surely Form 16E can also be used to include interest. I see no reason why the words "AND INTEREST" cannot be added to the heading of Form 16E with the appropriate amount of interest inserted showing separately and clearly the principal sum plus the interest to make up a particular amount which is demanded. By virtue of section 62 of the Interpretation Act (No. 23 of 1967) it would seem that amending Form 16E would not invalidate the claim as the deviation is to make the intention clear rather than to mislead.

Order accordingly.

Solicitors: *J. R. Devadas; Cheang Lee & Ong.*

RE ABDUL RAZAK BIN ROUSE

[F.C. (Suffian L.P., Lee Hun Hoe C.J. (Borneo) and Raja Azlan Shah F.J.) August 26, 1974]

[Ipoh — Federal Court Civil Appeal No. 78 of 1974]

Advocates Ordinance (Sabah Cap. 2), ss. 4 & 6 — Admission of advocate — Requirement that applicant has been normally resident in Sabah for six months — Meaning of "normally resident".

This is an appeal against the refusal of the learned judge in Sabah to make an order for the admission of the petitioner to the Sabah Bar on the ground that he was not normally resident in Sabah for the period of six months prior to the date of his application. The petitioner had stayed in Sabah for six months but at the time of the application he had not obtained permanent stay from the immigration authority but only possessed a work pass for three years.

Held: the learned judge was wrong in ruling that the petitioner must be in possession of a certificate of permanent stay otherwise he could not claim to be normally resident. On the facts the petitioner was normally resident in Sabah and therefore his application for admission should be granted.

Cases referred to:-

(1) *Peak Trailer & Chassis Ltd.* v. *Jackson* [1967] 1 All E.R. 172, 176.
(2) *Fox* v. *Stirk* [1970] 3 All E.R. 7.
(3) *Macrae* v. *Macrae* [1949] 2 All E.R. 34, 36.
(4) *Levene* v. *Inland Revenue Commissioners* [1928] A.C. 217 @ 232; [1928] All E.R. Rep. 746 @ 753, 754.
(5) *Re Jimmy Loh Huan Moh* [1968] 1 M.L.J. 94.
(6) *Attorney-General* v. *Coote* (1817) 4 Price 183.

Miss Chen Kah Leng for the petitioner — appellant.

Encik Yusuf bin bin Abdul Rashid, State Attorney-General, Sabah, as *amicus curiae.*

Lee Hun Hoe C.J. (Borneo) (delivering judgment of the Court): We allowed the appeal and directed that upon payment of the prescribed fee the Deputy Registrar of the High Court in Borneo would cause the name of the appellant to be entered on the Roll of Advocates for the State of Sabah. We also stated we would give our reasons later. We do so now.

This is an appeal against the refusal of the learned judge in Sabah to make an order under section 6 of the